In the Supreme Court of the United States.

OCTOBER TERM, 1923.

ENEAS J. MCCURDY, COUNTY TREASURER, Osage County, Oklahoma; Andrew B. Ludwick, County Clerk, Osage County, Oklahoma; the Board of Commissioners of Osage County, Oklahoma; the American National Bank, Pawhuska, Oklahoma, and Robert S. Stuart, Appellants,

v.

THE UNITED STATES OF AMERICA.

No. 135.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a suit by the United States against Osage County, Oklahoma, and others, to enjoin the sale for taxes for the year 1909 of lands allotted to non-competent members of the Osage Tribe of Indians, to set aside sales already made of such lands on account of taxes alleged to be due and delinquent for that year, and to recover money paid by certain of the Indians to redeem their lands that were sold.

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The case was heard on the bill and answer and a stipulation of the parties, consequently there is no dispute as to the facts.

The bill alleged that the lands in question are a part of the tract purchased by the United States on June 14, 1883, from the Cherokee Nation for the use and benefit of the Osage and Kansas Indians (R. 20), and that they were allotted as surplus lands to certain members of the tribe pursuant to the provisions of the act of June 28, 1906, c. 3572, 34 Stat. 539. (R. 20.)

All the members of the tribe in whose names these allotments were made died prior to the completion of the allotments. (R. 22, 38.)

The bill further alleged that some time prior to November 5, 1917, the county treasurer advertised for sale the lands involved to enforce the collection of taxes for the year 1909, and that pursuant to such advertisement, a public sale was held at Pawhuska, Oklahoma, on November 5, 1917, and the lands were sold for delinquent taxes to the defendant American National Bank of that place.

The bill further alleged that under the laws of Oklahoma real estate was subject to assessment for taxes for the year 1909 in the name of the owner as of March 1st of that year (Gen. Stats. Oklahoma, 1908, § 6086), and that at that time the lands involved were owned by the United States in trust for the Osage Tribe, title not having vested in the individual members, as the lands were then included in a certain tentative schedule of allotments

to individual members; that while the schedule had been approved by the Secretary of the Interior this approval was but one of a series of steps looking to the final transfer of title which, under the law, could not become complete until deeds were signed by the principal chief of the tribe in May and June, 1909, and approved by the Secretary of the Interior, and that was not done until July 30, 1909. (R. 22, 23.)

The bill prayed for an injunction against the county authorities enjoining them from delivering any tax certificates, deeds, or other instruments of title affecting the lands described or others similarly situated and from collecting or demanding any sums of money from the Indians on account of taxes for the year 1909. (R. 8.)

Motions to dismiss the original bill were overruled by the District Court, and an amended bill was filed by the plaintiff to make the Board of County Commissioners a party defendant and to show what sums of money had been paid by certain of the Indians to redeem their lands that had been sold. The amended bill prayed for a recovery of this money, and asked that all sales of the lands for taxes be set aside and cancelled. (R. 19, 26.)

The defendants answered the amended bill admitting the material averments and, as stated, the case was heard on the bill and answer and a stipulation of the parties. (R. 38.)

Upon the hearing the District Court entered a decree dismissing the bill, but continuing in force the temporary injunction previously issued, pending

the final determination of the cause, and the government sued out an appeal to the Circuit Court of Appeals (R. 52), where the action of the District Court was reversed with instructions to grant the relief prayed for. The further appeal of the defendants brings the case before this court (R. 66).

The opinion of the Court of Appeals will be found in the record at page 61; it is also reported in 280 Fed. 103.

STATEMENT OF THE ARGUMENT.

(1) Lands held in trust for Indians by the United States are not subject to taxation by the state authorities.

(2) No title to any of the lands involved passed to the individual members of the tribe until deeds therefor were signed by the principal chief of the tribe and until those deeds were approved by the Secretary of the Interior.

(3) The government is entitled to recover the money that the Indians were coerced into paying to redeem their lands.

ARGUMENT.

I.

Lands held in trust for Indians by the United States are not subject to taxation by the state authorities.

This proposition is too well settled to require elaborate discussion. *United States* v. *Rickert*, 188 U. S. 432; *The Kansas Indians*, 5 Wall. 737. Moreover,

there is special statutory provision governing the taxation of these lands.

By the enabling act of June 16, 1906, c. 3335, 34 Stat. 267, under which the Territory of Oklahoma and the Indian Territory became the state of Oklahoma, it was declared that nothing in the constitution to be adopted by the proposed state (§1)—

> shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreements, law, or otherwise, which it would have been competent to make if this act had never been passed.

And by the Constitution adopted by the new state it was provided (§ 3, art. 1) that the people inhabiting the state—

> do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation.

Also, by § 6 of article 10 of the Constitution, property exempt from taxation was declared to include—

> such property as may be exempt by reason of treaty stipulations existing between the

> Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws.

The act of June 28, 1906, *supra*, under which these lands were allotted and to which we must look to find when they became subject to taxation, after reserving from allotment certain parcels, provided that from the remainder each member was to be allotted three tracts of 160 acres each, of which one was to be designated as a homestead. Any land remaining was also to be allotted. The funds of the tribe in trust in the hands of the United States were divided pro rata, to be held subject to the supervision of the United States. All oil, gas, and other mineral rights in the lands were reserved for the benefit of the tribe. The tract selected as a homestead was made inalienable and nontaxable subject to the action of Congress. The land embraced in other than homestead allotments, which was called surplus land, was made inalienable for a period of twenty-five years and nontaxable for three years subject to the action of Congress. But the Secretary of the Interior was given power to issue to the allottee a certificate of competency upon which the surplus land held by such allottee became immediately alienable and taxable. *United States* v. *Osage County*, 251 U. S. 128.

Subdivision 7 of § 2 of the act contains the following:

> *Provided*, That the surplus lands shall be nontaxable for the period of three years from

> the approval of this act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress.

It is upon this provision of the law that the defendants rely, because all of the allottees died prior to March 1, 1909. This brings us at once to a consideration of our second point.

II.

No title to any of the lands involved passed to the individual members of the tribe until deeds therefor were signed by the principal chief of the tribe and until those deeds were approved by the Secretary of the Interior.

It will not be seriously contended that the lands were taxable prior to their allotment, because until they were allotted to individual members they were held in trust by the United States for the benefit of the tribe and while so held they were clearly nontaxable. It is plain that Congress intended the surplus lands as a class to be exempt from taxation for a period of three years following the approval of the act, the inference being that they would be taxable at the end of that time. The act also indicates that surplus allotted lands should become taxable before the expiration of the three-year period in the event that a certificate of competency were issued to the allottees or in event of their death.

However, it is equally clear from the act that lands were not to become subject to taxation until title had passed to the individual members, and the act

expressly provides how that title shall pass, namely, by deeds signed by the principal chief of the tribe and approved by the Secretary of the Interior. In this connection the act declares that no such deed shall be valid until it is so approved. The deeds in this case were not even signed by the principal chief of the tribe until in May and June, 1909, and were not approved by the Secretary of the Interior until July 30th of that year.

The Oklahoma statute in force at that time provided that real estate should be taxable against the owner as of March 1st in any one year, and on March 1, 1909, the legal title to these lands was in the United States in trust for the Osage Tribe, because the deeds which were necessary to pass title to the individual members had not been approved by the Secretary of the Interior and had not even been signed by the principal chief of the tribe. The signing by the chief was necessary to pass the equitable interests of the tribe, and the approval of the Secretary was necessary to convey the legal title which up to that time was held by the United States.

So long as the legal title remained in the United States and the allotment act was in the course of administration by the Interior Department, it was beyond the power of the state to interfere in any manner with that administration by imposing a tax upon the land. The act in this case was in the course of administration, and the lands remained within the jurisdiction of the Interior Department

until that jurisdiction was lost by the passing of title to the individual allottee. That was done by the deed executed by the principal chief of the tribe when such deed received the approval of the Secretary of the Interior and not before, because the act of 1906 declares (§ 8)—

> That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages but no such deeds shall be valid until approved by the Secretary of the Interior.

This language is too plain to require construction.

That the allotment was not completed until deeds were issued to the allottees is further shown by that provision of subdivision 7 of § 2 of the act which provides—

> that the Secretary of the Interior in his discretion at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands *deeded* him by reason of this act.

This clearly indicates that the allottee to whom a certificate of competency was issued could not sell lands until they were deeded to him, and it is in this same subdivision 7 of § 2 that we find the provision that the surplus lands shall be nontaxable for a period of three years from the approval of the act except where certificates of competency are issued or in case of the death of the allottee. We submit that the word allottee here means one to

whom the land has been deeded, that is, one in whom title is actually vested.

The allotment act of June 28, 1906, *supra*, provides that each member of the tribe shall designate which one of his selections shall constitute his homestead and the same shall be so designated in his certificate of allotment and in his deed. Until the deeds were issued, therefore, it could not be definitely known what land constituted the homestead and until that was known no taxes could be lawfully assessed against the land because the homesteads were expressly made nontaxable. Indeed these lands were not assessed for taxes in the year 1909, and nobody at that time believed that they were taxable. It was not until six years later that a tax ferret employed by the state conceived the idea that the lands were liable for taxes for the year 1909, and they were then, in 1915, placed on the tax rolls for the year 1909. (R. 5.)

The jurisdiction of the Secretary of the Interior to approve or disapprove was not lost by his approval of the schedule of allotments, because that was not the final act in the passing of title. No title vested in any individual member of the tribe until the deeds were executed by the principal chief and until those deeds were approved by the Secretary of the Interior. Until that was done the legal title remained in the government, and it was within the power of the Secretary to change any allotment because it was clearly the policy of the allotment act to retain in the Secretary the power to revise until the final

moment when jurisdiction was taken from him. *Lowe* v. *Fisher*, 223 U. S. 95.

In the case of *United States* v. *Reynolds*, 250 U. S. 104, it was contended that the twenty-five-year period during which the United States held the title in trust for the benefit of an allottee under the general allotment act of 1887 began with the approval of the allotment by the Secretary and not from the date of the patent, and the Court of Appeals reversed the action of the District Court which held that the twenty-five-year trust period began with the date of the patent. The case was taken to this court, however, where the action of the Court of Appeals was reversed, and it was held that the period began to run from the date of the patent. In that case the court distinguished the case of *Ballinger* v. *Frost*, 216 U. S. 240, which turned upon the effect of a certificate of allotment issued under the Choctaw and Chickasaw agreement (Act of July 1, 1902, c. 1362, 32 Stat. 641, 644), § 23 of which declared that such certificate should be "conclusive evidence of the right of any allottee to the tract of land described therein." The Indian being a citizen and a resident of the Choctaw Nation duly enrolled and entitled to an allotment, selected the land in controversy upon which her improvements were situated; this was received by the Commission to the Five Civilized Tribes, and after the expiration of nine months, the time prescribed by statute for contest, no contest having been made, a certificate was issued and delivered to her. This court held

that the allottee's rights had become fixed, the Secretary of the Interior thereafter having nothing but the ministerial duty to perform of seeing that a patent was duly executed and delivered.

The *Frost case* is clearly distinguishable from this also, because the approval by the Secretary of the Interior of the schedule of allotments was not made final by the act of 1906, the final act being his approval of the deed when executed by the principal chief of the tribe.

So, in *United States* v. *Rowell*, 243 U. S. 464, the act of Congress of June 17, 1910, c. 299, 36 Stat. 533, authorized and directed the Secretary of the Interior to allot to Rowell a certain tract of land and to issue him a patent therefor to be in lieu of all allotment and all money claims on account of allotment. Rowell demanded his patent, but before it was issued Congress repealed the act, December 19, 1910, c. 3, 36 Stat. 887. Thereafter Rowell claimed perfect title under the granting act and took possession of the land, whereupon the government instituted proceedings to oust him. The District Court held that his title was complete under the act of June 17, 1910, but on a writ of error from this court the action of the District Court was reversed, it being held that the issue of the patent was necessary to the passing of the title and to the vesting of any right in the grantee.

However, it will be contended that as the allotment was made in this case by the allotting commission

and approved by the Commissioner of Indian Affairs and the Secretary of the Interior prior to March 1, 1909, the subsequent issue of the deed by the principal chief of the tribe and its approval by the Secretary of the Interior, related back to the date of the allotment. In answer to that it may be said that the doctrine of relation is never applied to impose a burden. It is a fiction of law adopted by the courts solely for the purposes of justice and is only applied for the security and protection of persons who stand in some privity with the party who instituted proceedings for the land and acquired the equitable claim or right to title. *Gibson* v. *Chouteau*, 13 Wall. 92. Also see *Lykins* v. *McGrath*, 184 U. S. 169, where it is said that the doctrine of relation is resorted to with the view of accomplishing justice.

The statute here involved was construed by the Circuit Court for the western district of Oklahoma in the *United States* v. *Aaron*, 183 Fed. 347, which involved the sale of both surplus and homestead lands that had been allotted in the name of a deceased Indian, Cena June. The deed to the homestead in that case had been executed by the principal chief of the tribe and had been approved by the Secretary of the Interior, while the deed for the surplus land had been executed by the principal chief but had not been approved by the Secretary. The heirs of Cena June assumed to sell both homestead and surplus lands, and the United States brought suit to set aside the sale. The Circuit Court held that the deed for the

surplus land did not vest any title in the allottee because the same had not been approved by the Secretary of the Interior, and in that connection the court said (p. 351):

> As Congress controls the disposition of these tribal lands and it thus makes the approval of the Secretary requisite to the validity of the deeds, it must be held that the surplus lands were not effectively allotted or divided, and that title was not vested in the heirs of Cena June.

True, the Court of Appeals, in affirming the Circuit Court (204 Fed. 943), based its decision upon other grounds and the doctrine of relation was applied so as to permit the deed to the heirs to relate back to the allotment that had been made to the ancestor, but that was done for the purpose of justice and the protection of the heirs.

We repeat that on March 1, 1909, it could not be certainly known what lands would be designated as homesteads because the allotments had not been completed. Congress itself, as late as February 27, 1909, recognized, if it did not declare, that the designation of the homesteads had not become final, because on that date it adopted a joint resolution providing that the homesteads might consist of land designated from any one or more of the first three allotment selections, the designation thereof to be subject to the approval of the Secretary of the Interior. (35 Stat. 1167.) It will be remembered that the act of 1906 provided that one of the first three

selections should be designated as a homestead but the joint resolution of February 27, 1909, changed that and authorized the homestead to be designated from any one or more of the first three selections. This took place more than three months after the allotment schedules had been approved, hence we know that the approval when made was not final.

We submit that this action by Congress clearly establishes our contention that none of the lands were subject to taxation for the year 1909, because on March 1 of that year no title had vested in any of the individual allottees, and it was not known what lands would be subject to taxation.

III.

The government is entitled to recover the money that the Indians were coerced into paying to redeem their lands.

If, then, as we contend, the taxes were unlawfully assessed and levied against these lands, the government is entitled to recover from the county the money paid by certain of the Indians to redeem their lands that were sold, because the bill avers that the money paid by the Indians was paid under duress, in that the owners of the different tracts were confronted as they thought by the possible loss of their lands through the issuance of deeds to purchasers or to the payment of further amounts by the way of penalties and interest. (R. 25.)

In this respect this case is very much like that of *Ward* v. *Love County*, 253 U. S. 17. The *Love County*

case involved taxes that had been collected by the county on lands declared to be nontaxable by federal laws. In reversing the decision of the Supreme Court of Oklahoma this court said (p. 23):

> The claimants were Indians just emerging from a state of dependency and wardship. Through the pending suits and otherwise they were objecting and protesting that the taxation of their lands was forbidden by a law of Congress. But notwithstanding this the county demanded that the taxes be paid and by threatening to sell the lands of these claimants and actually selling other lands similarly situated made it appear to the claimants that they must choose between paying the taxes and losing their lands. To prevent a sale and to avoid the imposition of a penalty of eighteen per cent they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal. * * *
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> As the payment was not voluntary but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. * * * To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. * * *
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> If it be true * * * that a portion of the taxes was paid over after collection to the state and other municipal bodies, we regard

it as certain that this did not alter the county's liability to the claimants.

We submit that the *Love County case* is directly in point and controlling on this question, and that therefore the money paid by certain of the Indians to redeem their lands should be refunded.

CONCLUSION.

It is respectfully submitted that the decree of the Court of Appeals should be affirmed.

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SEPTEMBER, 1923.

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